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CHARLES ELMORE CROPLEY

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1932.

No. 564

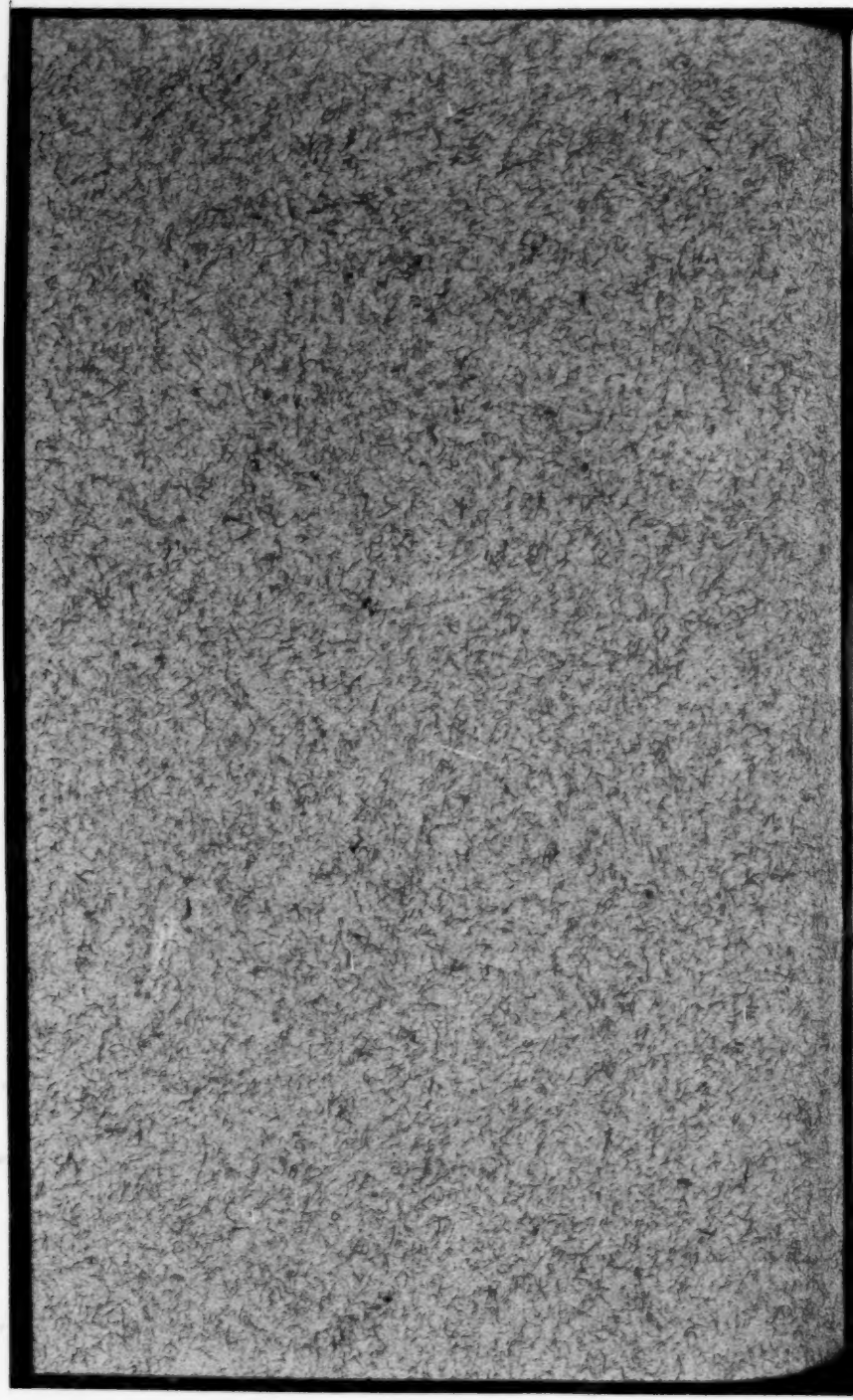
F. E. BUFFUM, as Trustee in Bankruptcy of Henry Joseph Barceloux, Bankrupt, Petitioner,

vs.

PETER BARCELOUX COMPANY.

MEMORANDUM SUPPLEMENTING PETITIONER'S OPENING ORAL ARGUMENT.

ROBT. T. DEVLIN,
WM. H. DEVLIN,
GEORGE R. FREEMAN,
HORACE B. WULFF,
Counsel for Petitioner.



SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1932

No. 564

F. E. BUFFUM, AS TRUSTEE IN BANKRUPTCY OF HENRY JOSEPH BARCELOUX, BANKRUPT, PETITIONER,

vs.

PETER BARCELOUX COMPANY.

MEMORANDUM SUPPLEMENTING PETITIONER'S OPENING ORAL ARGUMENT.

Pursuant to the order of this Court, petitioner files this memorandum, as a supplement to petitioner's opening oral argument and to be deemed a part thereof. This memorandum enumerates, with appropriate references, those parts of respondent's statement of facts which are deemed to be inaccurate or unsupported by the record or misconstructive of petitioner's contentions and theories. Respondent's statement of facts is found in respondent's brief, pages 2 to 25, inclusive.

Resp. brief, p. 4, 2d par.:

> "It is to be noted that the regularity of the sale was only attacked on the grounds mentioned,"

to wit, lack of demand of notice.

Incorrect. See R. 10, paragraph VIII, where it is alleged, with respect to the pledges and the sale,

> "all of which was so done and taken with intent to hinder, delay and defraud * * * the sale and everything that was done thereunder was fraudulent and void * * * in that all of said transactions were conceived, executed and taken from beginning to end with intent to hinder," etc.

Resp. brief, p. 5, par. denoted as "third"; also the 5th par. on p. 5, beginning "At the time", etc.

The statement is incorrect wherein it suggests that the suit is to recover the value of the shares, less the amount owing to Freeman. Freeman had been dismissed on the incoming of the answer, which contained admissions showing that while Freeman was originally a proper defendant, he was no longer such. See dismissal by consent of Freeman (R. 29). Henceforth the bill stood as a prayer for full recovery.

Resp. brief, p. 5, last par., and p. 6, pars. marked 1, 2, 3, 4.

Respondent states the following facts stand admitted by the pleadings:

1. That a written pledge agreement was entered into.

2. That the shares of stock were delivered to the respondent.

3. That the respondent held a sale under the pledge and sold under it.

4. That the indebtedness is not denied.

The statement that these facts stand admitted is incorrect, because the bill alleged, with respect to each and every of said facts, that they were "purported" (R. pp. 4, 5, 8), and the general tenor of the bill was to allege that they were not in fact as they purported to be.

Resp. brief, p. 6, par. marked (IV).

Respondent here states that the bill admitted the indebtedness secured by the pretended pledge by alleging that the pledge was made "to secure certain preexisting indebtedness," etc. The bill made no such admission. It alleged that Henry "*purported* to secure certain preexisting indebtedness," etc. (R. 4, par. IV), and the bill alleged with respect to all of the claimed debts, that the complainant has no information or belief as to the amount due and upon such lack of information alleged that no sum whatever was then or there due, owing or payable (R. 8, middle of page).

Resp. brief, p. 7, last par., stating that Henry Barceloux delivered Certificate No. 5 to his brother-in-law.

There is no reference to the record substantiating this statement, but see R. 345-347, where the bankrupt testifies with great uncertainty just what was done,

if anything, by way of delivery, but testifies to a delivery in 1917 with an endorsement of 1923.

Resp. brief, p. 8:

> "This certificate of stock was an endorsement as of February, 1923 (R. 335)."

On page 335, George Barceloux testified:

> "That date was put on later,"

and Certificate No. 5, here as an original exhibit, shows different handwritings in the endorsement and date.

Resp. brief, p. 8, 1st par.:

> "It is undisputed that the stock remained in the possession of the secretary."

Incorrect. R. 302 shows that the secretary died in February, 1923, after which time and until July, 1926, the stock certificate was in the hands of Henry Barceloux (R. 346, 296, 302). The pledge agreement, made on a separate instrument (Plaintiff's Exhibit No. 4), was not made until April 27th, 1926, at which time Henry still had and retained possession of the certificate (R. 309, 337).

Resp. brief, p. 8, 3d to 5th par., relating to endorsement of pledge of Certificate No. 5.

It has already been noted that this endorsement was added later in a different handwriting, and further there is much uncertainty where the special endorsement was placed on the certificate (R. 308-309).

Resp. brief, p. 9, 2d par., stating that the pledge agreement of April, 1926, was not made because of any demand of Freeman for payment or security of the judgment.

Incorrect. R. 303, 304, testimony of George Barceloux, shows that the pledge agreement was obtained after 60 days of effort because

> "we became suspicious * * * he finally came for $3,000 to give (Freeman) and that was the limit."

Resp. brief, p. 9, 4th par., stating that the pledge agreement "was primarily prompted by the fact that the minority stockholders" demanded some action be taken, referring to R. 310.

This misapplies the testimony found on R. 310, which related to the second pledge about the 1st of July, 1926, of bank, insurance and garage shares as additional security. The dissatisfaction of the three nephews had nothing to do with obtaining the pledge agreement of April, 1926.

Resp. brief, p. 10, last par., continuing on p. 11, stating that the pledge sale was to satisfy indebtedness created previously under an original arrangement between Henry Joseph Barceloux and his father.

Incorrect. The father died in 1918 (R. 297). After that, testifies George Barceloux, he gave the certificate for security (R. 297-298). Henry Barceloux had the certificate after February, 1923, when his brother-in-law died (R. 302). The ledger sheet (Plaintiff's Ex-

hibit No. 7) shows that no debt existed from Henry Barceloux to the corporation June, 1923.

Resp. brief, p. 12, 4th par., stating that Henry Barceloux testified on page 327 of the Record.

The reference is incorrect; page 327 contains the testimony of George Barceloux. If the intended reference was R. 371, then Henry's testimony is either false or qualified by his testimony shown on Record 367, by that of George Barceloux on Record 314, and by that of Freeman on Record 401, all of which showed that creditors were pressing.

Resp. brief, p. 15, 1st par., stating that Freeman had knowledge of the indebtedness and the pledge, and referring to page 401 of the Record; also the 2d par., stating that Freeman had knowledge of Barceloux's properties and assets, that he knew everything, referring to R. 372.

Incorrect and misleading. On page 402 is found Freeman's testimony that he knew only what Henry told him, and that Henry had given a statement of indebtedness of about $24,000.00. There was no statement of Henry's assets, except that found on page 372, where Henry testified that he gave statements of assets as shown on the books which Henry stated were not correct.

Resp. brief, p. 15, 4th and 5th par., referring to the communication with Mr. Ware and referring to R. 412.

The communications with Ware occurred about the 1st or 2nd of July, as appears from the letters of Ware

& Ware set out in Record, 405 to 409, inclusive. Thus it appears that the communications were made after the assignment was taken and during negotiations to obtain from the corporation an acknowledgment and statement of the indebtedness claimed by it. It was in no sense corroborative or admissive, as claimed.

Resp. brief, p. 17, par. 1 to 3 inc., stating that Henry Barceloux furnished Freeman with a complete statement of assets and liabilities, referring to R. 411.

Incorrect. The statement there referred to was not the statement of indebtedness. The only statement of assets, if any, ever furnished was the one referred to by Henry Barceloux, which he informed Freeman was incorrect (R. 372). It has already been mentioned.

Resp. brief, p. 18, 3d par., stating that Freeman testified that the three kept faith in endeavoring to collect the Donohoe judgment, and referring to R. 413.

Incorrect and misleading. The testimony relates to faith kept up to the time when it became apparent that nothing could be made out of the bankrupt estate of Donohoe. This referred to a time prior to April 27, 1926, when Henry Barceloux gave the pledge agreement assailed in the bill, which pledge agreement was a violation of the promise not to hypothecate any of Henry's properties. See R. 401, bottom of page, where Freeman's testimony appears that he had no notice in June, 1926, of the pledge agreement, other than Henry's statement (See R. 401-402), and see R. 371-372, showing that the agreement between Freeman,

Henry Barceloux and Henry's attorney was not to make any hypothecations.

Resp. brief, p. 20, pars. 3 and 4, referring to record 375, and stating that Henry Barceloux offered Freeman as security the Pacific National and garage and the bank stock, but that Freeman declined that offer and that Barceloux's testimony in this respect is not disputed by Mr. Freeman.

Incorrect. At page 402 of the record, end of second paragraph, appears Freeman's testimony explaining that Barceloux did not want him to take this bank stock, and Freeman said he did not want those things because they were hypothecated for large amounts, but he testified, "I did not refuse to take anything."

Resp. brief, page 20, par. 6, stating that as a result of these various transactions, the Peter Barceloux Company and George R. Freeman were satisfied. This is incorrect. Freeman's debt was never satisfied. There is no proof whatever in the record that Freeman's debt has been paid.

The same misstatement that Freeman was satisfied occurs on page 22, par. 5.

Resp. brief, page 22, par. 3, stating that there is no charge of any conspiracy on the part of the Company and Henry Barceloux to defeat his creditors.

Incorrect. The bill of complaint alleges (R. 10):

> "that said pledges, and each of them, and the sale and everything that was done thereunder was fraudulent and void, * * * in that all

> of said transactions were conceived, executed and taken from beginning to end with the intent to hinder, delay and defraud," etc.

This follows an allegation that the Peter Barceloux Company failed and refused to adjourn the sale, all of which was done with that intent.

Resp. brief, p. 23, last par., saying that the statement in the brief is incomplete and misleading.

It is the respondent's brief which is misleading, because it states that the Gelinas transaction took place after Freeman had been satisfied. His debt was never satisfied, and because he was never paid the transfer to Gelinas is mentioned as a material fact.

Resp. brief, p. 25, 2d par., referring to the statement in the dissenting opinion (R. 469) that Certificate No. 12 bears a feigned date.

Certificate No. 12 is found in Plaintiff's Exhibit No. 3, the stock-book of Peter Barceloux Company, and is dated June 29th, which bears out the statement made in the dissenting opinion, for the reason that said certificate was issued because George Barceloux heard that Freeman recorded a Trust deed on the Lake County Ranch (R. 314), which Trust deed was recorded on July 3rd, 1926 (see Exhibit No. 16).

Resp. brief, p. 53, 2d par., where the statement is made that the property was bid in by George A. Barceloux, who executed a promissory note to the corporation.

This is incorrect. At the pledge sale the property was bid in and purchased by respondent company. This is alleged in respondent's answer (R. 21, middle of page), and the answer alleges that afterwards the Peter Barceloux Company sold all of said securities to George A. Barceloux (R. 26). George Barceloux did not, therefore, take as a purchaser at the pledge sale, but as a purchaser from the corporation.

Respectfully submitted,

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